

U.S. Department of Justice

Criminal Division



Office of Deputy Assistant Attorney General

Washington, D.C. 20530

March 10, 2004

VIA HAND DELIVERY

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Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: Joint Petition for Expedited Rulemaking Concerning the Communications Assistance for Law Enforcement Act

Dear Secretary Dortch:

Pursuant to Section 1.401(a) of the Commission's Rules, 47 C.F.R. § 1.401(a), the Federal Bureau of Investigation, U.S. Department of Justice, and U.S. Drug Enforcement Administration (collectively, "Law Enforcement") hereby submit an original and four (4) copies of a Joint Petition for Expedited Rulemaking ("Petition") which requests that the Commission promptly initiate a new rulemaking docket to resolve, on an expedited basis, various outstanding issues associated with the implementation of the Communications Assistance for Law Enforcement Act ("CALEA"), 47 U.S.C. § 1001 *et seq.* Law Enforcement requests that the Commission assign a new docket number to the Petition.

Copies of the Petition have also been provided for delivery to the Chairman, each of the Commissioners, and selected members of the Commission's staff (as indicated on the certificate of service attached to the Petition).

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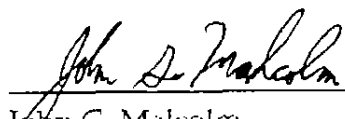
Marlene H Dortch, Secretary

March 10, 2004

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Respectfully submitted,

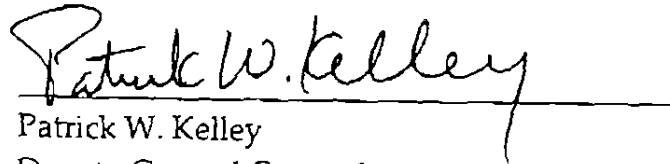
THE U.S. DEPARTMENT OF JUSTICE

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March 10, 2004  
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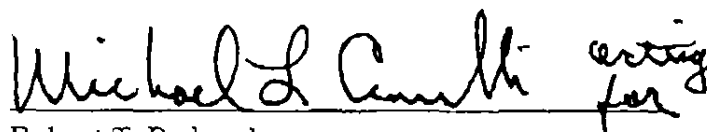
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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
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United States Department of Justice, Federal ) RM No. \_\_\_\_\_  
Bureau of Investigation and Drug )  
Enforcement Administration )  
 )  
Joint Petition for Rulemaking to Resolve )  
Various Outstanding Issues Concerning the )  
Implementation of the Communications )  
Assistance for Law Enforcement Act )

JOINT PETITION FOR EXPEDITED RULEMAKING

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## SUMMARY

The United States Department of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Administration (collectively, “Law Enforcement”) bring this joint petition for expedited rulemaking pursuant to their authority to implement the Communications Assistance for Law Enforcement Act (“CALEA”). CALEA’s purpose is to preserve law enforcement’s ability to conduct lawful electronic surveillance despite changing telecommunications technologies. CALEA applies to all telecommunications carriers, and its application is technology neutral

Despite a clear statutory mandate, full CALEA implementation has not been achieved. Although the Commission has taken steps to implement CALEA, there remain several outstanding issues that are in need of immediate resolution.

To resolve the outstanding issues, Law Enforcement asks the Commission to:

- (1) formally identify the types of services and entities that are subject to CALEA,
- (2) formally identify the services that are considered “packet-mode services”;
- (3) initially issue a Declaratory Ruling or other formal Commission statement, and ultimately adopt final rules, finding that broadband access services and broadband telephony services are subject to CALEA;
- (4) reaffirm, consistent with the Commission’s finding in the *CALEA Second Report and Order*, that push-to-talk “dispatch” service is subject to CALEA;
- (5) adopt rules that provide for the easy and rapid identification of future CALEA-covered services and entities;
- (6) establish benchmarks and deadlines for CALEA packet-mode compliance;



- (7) adopt rules that provide for the establishment of benchmarks and deadlines for CALEA compliance with future CALEA-covered technologies;
- (8) outline the criteria for extensions of any benchmarks and deadlines for compliance with future CALEA-covered technologies established by the Commission;
- (9) establish rules to permit it to request information regarding CALEA compliance generally;
- (10) establish procedures for enforcement action against entities that do not comply with their CALEA obligations,
- (11) confirm that carriers bear sole financial responsibility for CALEA implementation costs for post-January 1, 1995 communications equipment, facilities and services;
- (12) permit carriers to recover their CALEA implementation costs from their customers, and
- (13) clarify the cost methodology and financial responsibility associated with intercept provisioning.

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
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United States Department of Justice, Federal	)	RM No. _____
Bureau of Investigation and Drug	)	
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Various Outstanding Issues Concerning the	)	
Implementation of the Communications	)	
Assistance for Law Enforcement Act	)	

**JOINT PETITION FOR EXPEDITED RULEMAKING**

The United States Department of Justice ("USDOJ"), the Federal Bureau of Investigation ("FBI"), and the Drug Enforcement Administration ("DEA") (collectively, "Law Enforcement"), pursuant to Section 1.401(a) of the Commission's Rules, 47 C.F.R. § 1.401(a), hereby jointly petition the Federal Communications Commission to immediately initiate an expedited rulemaking proceeding to resolve various outstanding issues associated with the implementation of the Communications Assistance for Law Enforcement Act ("CALEA"), 47 U.S.C. § 1001 *et seq.*

**STATEMENT OF INTEREST**

Law Enforcement seeks resolution of the outstanding issues associated with CALEA implementation pursuant to its authority to implement CALEA

## I. INTRODUCTION AND BACKGROUND

Electronic surveillance refers to the interception of call content and/or call-identifying information through the use of wiretaps and/or pen registers and trap and trace devices. Lawfully-authorized electronic surveillance is an invaluable and necessary tool for federal, state, and local law enforcement in their fight against criminals, terrorists, and spies.

In 1968, Congress passed the Omnibus Crime Control and Safe Streets Act ("OCCSSA").<sup>1</sup> Title III of the OCCSSA delineated the procedures law enforcement must follow to obtain the necessary judicial authorization to conduct electronic surveillance. In 1970, Congress amended Title III of the OCCSSA to clearly prescribe the duty of service providers and others to provide law enforcement with the technical and other assistance necessary to accomplish lawfully-authorized intercepts.<sup>2</sup> In 1986, as a result of developments in telecommunications and computer technologies, Congress passed the Electronic Communications Privacy Act ("ECPA"),<sup>3</sup> which amended the OCCSSA by broadening its coverage to include electronic communications (including e-mail, data transmissions, faxes, cellular telephones, and paging devices). The provisions of Title III of the OCCSSA, as amended, continue to govern the procedures law

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<sup>1</sup> Pub. L. No. 90-351, 82 Stat. 212 (1968).

<sup>2</sup> Pub. L. No. 91-644, 84 Stat. 1880 (1971).

<sup>3</sup> Pub. L. No. 99-508, 100 Stat. 1848 (1986).

enforcement must follow to obtain authority to initiate and conduct lawful interceptions of wire, oral, and electronic communications.

In 1994, in response to changes in system design and the rapid proliferation of new telecommunications technologies and services since the enactment of the OCCSSA and ECPA,<sup>4</sup> Congress passed CALEA.<sup>5</sup> CALEA did not provide law enforcement with any additional surveillance authority. Rather, CALEA's purpose is to *maintain* the ability of law enforcement to conduct lawful electronic surveillance despite changing telecommunications technologies by further defining the telecommunications industry's existing obligation to provision lawful electronic surveillance capabilities and requiring industry to develop and deploy CALEA intercept solutions. CALEA applies to all telecommunications services — including those provided by wireline, wireless, cable operators, satellite, and electric or other utilities<sup>6</sup> — and its application is technology neutral.<sup>7</sup> CALEA's purpose is to help lawful electronic surveillance keep pace with

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<sup>4</sup> See CALEA Legislative History, H.R. Rep. No. 103-827(I), reprinted in 1994 U.S.C.A.N. 3489, 3494 ("CALEA Legislative History").

<sup>5</sup> Pub. L. No. 103-414, 108 Stat. 4279 (1994).

<sup>6</sup> CALEA Legislative History at 3500; *In The Matter of Communications Assistance for Law Enforcement Act*, Second Report and Order, 15 FCC Rcd 7105, 7111 ¶ 10 (1999) ("CALEA Second Report and Order").

<sup>7</sup> "CALEA, like the Communications Act, is technology neutral. Thus, a carrier's choice of technology when offering common carrier services does not change its obligations under CALEA." CALEA Second Report and Order at 7120 n. 69. See also *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report, 14 FCC

changes in telecommunications technology as telecommunications services migrate to new technologies.<sup>8</sup>

Consistent with the Commission's mandate to regulate the use of wire and radio communications, Congress assigned specific CALEA implementation responsibilities to the Commission. These implementation responsibilities include, among other things, determining which entities are considered "telecommunications carriers" for purposes of CALEA,<sup>9</sup> establishing technical requirements or standards for compliance with the assistance capability requirements of CALEA if industry standard-setting organizations fail to issue technical standards or industry-adopted standards are deficient,<sup>10</sup> and reviewing petitions for extension of the capability compliance date.<sup>11</sup> In addition, Congress also amended the Communications Act of 1934 ("Communications Act") to

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Rcd 2398, ¶ 23 (1999) (*"Section 706 Report"*) ("... we emphasize that whether a capability is broadband does not depend on the use of any particular technology or nature of the provider")

<sup>8</sup> The legislative history of CALEA specifically emphasizes this purpose. Representatives of the telecommunications industry that testified at the Congressional hearings on CALEA specifically acknowledged that "there will be increasingly serious problems for law enforcement interception posed by the new technologies and the new competitive market." *CALEA Legislative History* at 3495. To combat these increasingly serious problems, CALEA "requires telecommunications common carriers to ensure that new technologies and services do not hinder law enforcement access to the communications of a subscriber who is the subject of a court order authorizing electronic surveillance." *Id.* at 3496. Thus, CALEA is intended to "preserve the government's ability ... to intercept communications that utilize advanced technologies ... ." *Id.*

<sup>9</sup> See 47 U.S.C. § 1001.

<sup>10</sup> See 47 U.S.C. § 1006(b).

<sup>11</sup> See 47 U.S.C. § 1006(c).

add Section 229(a), which specifically directs the Commission to “. . .prescribe such rules as are necessary to implement [CALEA]”<sup>12</sup> Thus, the Commission has a direct and significant role in the implementation of CALEA

Technology continues to change at a rapid pace, and new and innovative services are being introduced to the American public on almost a daily basis. Although the Commission has taken steps to implement CALEA since its enactment, there remain a number of outstanding implementation issues. These outstanding implementation issues require immediate attention and resolution by the Commission, so that industry and law enforcement have clear guidance on CALEA as the implementation process moves forward. The importance of these issues justifies initiating a proceeding immediately. Moreover, initiating such a proceeding is consistent with the Commission’s ongoing obligation under Section 229(a) of the Communications Act to prescribe rules as necessary to implement CALEA

## **II. THE COMMISSION SHOULD CLARIFY WHICH SERVICES AND ENTITIES ARE SUBJECT TO CALEA**

### **A. The Need for Action by the Commission**

One of the central questions that must be answered in order for CALEA to be properly implemented is which services and entities are subject to CALEA. The Commission first addressed that issue in the *CALEA Second Report and Order*. As the

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<sup>12</sup> 47 U.S.C. § 229(a).